Supreme Court, U.S.
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No. 06-1137

In the Supreme Court of the United States

Rashid Arraleh,

Petitioner,

v.

County of Ramsey; Terry Zurn, Individually,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. Issue Of Employer Liability For Adverse Employment Actions Influenced Or Caused By Discriminatory Conduct Of Non-Management Employees Is Fairly Presented In This Case

A. Respondent Admits The Question Is Important

Respondent expressly agrees that the first question presented by the writ, whether Title VII and Section 1981 liability may be found when discriminatory conduct of non-managers influenced or caused an adverse employment action, is an important question upon which the Courts of Appeal are split.[1] It argues, however, that this important question can be adequately considered and resolved in the case in which this Court has already granted a writ of certiorari, *BCI Coca-Cola Bottling Co. v. EEOC*, __ U.S. __, 127 S. Ct. 852 (2007).[2] The *BCI* case, however, raises the question of whether discriminatory conduct of *lower level supervisors* who influence adverse employment actions can be the basis of liability. *See BCI*, 450 F.3d 476 (10th Cir. 2006). This case raises the question of whether discriminatory conduct by *non-managerial* employees who influence adverse employment actions can be the basis of liability. These questions are not identical, but they are inextricably related and bound up in the ultimate question presented by the split among the circuits, that is, to what extent will the conduct of non-decision makers be attributed to the employer for purposes of finding liability. Because the questions are intertwined, but not identical, it is important for the Court to also consider the question presented by the facts of this case.

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[1] *See, Brief For The Respondent In Opposition p. 10.*
[2] *Id.*

B. Arraleh Has Not Waived This Argument

Respondent's primary argument opposing this writ is its contention that Arraleh waived the argument in the lower courts. Respondent cites to nothing in the record that suggests that Arraleh affirmatively waived this argument, but rather argues that Arraleh did not raise it below with sufficient specificity to preserve the argument on appeal. In support of its argument, Respondent cites to the case of *Browning-Ferris Industries v, Kelco Disposal, Inc.*, 492 U.S. 257 (1989), in which this Court refused to consider an argument that the due process clause had been violated when the petitioner had never plead a violation of the due process clause and made no specific mention of it in its petition for certiorari. In the *Browning-Ferris* case, however, this Court found that there was an absence of a developed record on the issues relevant to the legal inquiry, and thus refused to consider the question as "only an enlargement" of the legal issues presented to the lower courts.

In this case, the issue was specifically raised in the petition for certiorari. More importantly, there is a fully developed record in this case of all of the facts pertaining to the legal issue of liability under Title VII and Section 1981. This case is an appeal of summary judgment, which is reviewed *de novo.* The doctrine of "clear intendment" should apply here. *See, Braniff Airways, Inc. v. Nebraska Bd. Of Equalization and Assessment*, 347 U.S. 590 (1954).[3]

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[3] Throughout its brief in opposition to the writ, Respondent misrepresents both the facts and the arguments presented by Arraleh to the district and appellate courts. Respondent's brief incorrectly states, for example, that Arraleh did not dispute Respondent's recitation of his alleged performance deficiencies. In fact, Arraleh presented evidence that some of the errors his discriminatory co-workers and managers attributed to him were blatantly false, were in fact errors committed by co-worker Donna Waldhauser, and that decision maker Zurn knew of the falsity of the allegations. *See Plaintiff's Memorandum Opposing Summary Judgment pp.6-7.*

Respondent's brief also incorrectly states that Arraleh presented no evidence that the decision makers, managers Terry Zurn and Patricia Brady, knew of the harassment of his co-workers. In fact, Arraleh

Arraleh specifically argued to both lower courts that there was direct evidence of discrimination, including the discriminatory remarks of Zurn, Brady and others.[4] The district court acknowledged Arraleh's argument that the discriminatory comments of his co-workers contributed to the discriminatory decision not to hire him. *A-35 to A-38.* While the district court rejected the argument, the court clearly "passed on the question."

Arraleh argued to both lower courts that the conduct of his co-workers was discriminatory.[5] Arraleh also argued to both lower courts that Zurn knew of the discriminatory and harassing conduct of Arraleh's co-workers, because co-workers Donna Waldhauser and Loretta Novak reported the conduct to him.[6] *Respondent* argued to both lower courts that Zurn based his employment decisions on the discriminatory complaints of Arraleh's co-workers, which Waldhauser had informed Zurn were false and harassing. For Respondent to contend that the Court cannot consider the legal ramification of its own factual arguments is disingenuous.

While the district and appellate court ignored the evidence presented by Arraleh, Arraleh presented the facts supporting this theory of liability. These facts and arguments lead to a specific dissent in the appellate panel based precisely on this theory of liability. While this theory of liability under

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presented evidence that he and two of his co-workers complained to Zurn and to Brady about the conduct. *See Plaintiff's Memorandum Opposing Summary Judgment pp. 10-11, 18.* Arraleh also submitted evidence that he informed Human Resources Manager George Hamm that he was having difficulty with his co-workers and asked Hamm if formally complaining about the conduct would negatively impact his chances of getting hired. Hamm told him making a complaint would hinder his ability to get a job with the County. *See Appellant's Reply Brief p. 5.*

[4] *Plaintiff's Memorandum Opposing Summary Judgment pp. 1-6, 11, 17, 25-26. Appellant's Brief pp.1-4, 22-23.*

[5] *Plaintiff's Memorandum Opposing Summary Judgment pp. 24-25. Appellant's Brief pp. 22-24.*

[6] *Plaintiff's Memorandum Opposing Summary Judgment pp.10-11, 18, 27. Appellant's Brief pp. 14-15, 25.*

Title VII and Section 1981 is arguably an enlargement of the direct evidence arguments presented below, the legal issue of what constitutes direct evidence of discrimination has been passed on below. Moreover, the court should take note that this issue is "in a state of evolving definition and uncertainty." *See Virginia Bankshares, Inc., v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991), and cases sited therein. Given the uncertain state of the law, when the Court has already agreed to entertain the legal question presented directly in the case and when the factual record below has been fully presented, the Court should accept review.

II. "Severe Or Pervasive" Standard Has Not Been Applied By The Courts Of Appeal

A. Respondent Admits The Eighth Circuit Incorrectly Articulated The Standard For Hostile Environment Discrimination

Respondent acknowledges that the Eighth Circuit has routinely articulated an incorrect standard for liability in hostile environment discrimination cases by articulating that standard to require conduct to be both "severe *and* pervasive."[7] Respondent's brief in opposition does not, however, address the incorrect use of this standard *across the circuit courts of appeal*. Respondent merely suggests that this Court should ignore the wide-spread use of an incorrect legal standard because Respondent believes that the courts correctly *apply* the standard, even though they incorrectly *articulate* the standard. Respondent rationalizes that, even though the Courts of Appeal routinely misstate the legal standard for liability set forth in *Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993), the Eighth Circuit correctly cited the "totality of the circumstances" analysis enunciated by this Court in *Harris*. The problem with this rationalization is obvious. The "totality of the circumstances" analysis under *Harris* is a list of factors to be used to determine whether conduct is sufficiently "severe *or*

[7] *See, Brief For The Respondent In Opposition p. 12.*

pervasive" to create a hostile environment. When Circuit Courts of Appeal apply the higher standard, the "severe *and* pervasive" standard, the "totality of the circumstances" analysis is measured against this higher standard.

B. Review Is Appropriate In This Case

Finally, Respondent argues that the Court should not accept review in this case, despite the Eighth Circuit's incorrect articulation of the legal standard in hostile environment cases, because of the Eighth Circuit's determination of the "employer response" element of the claim. Respondent cites to the Eighth Circuit's majority opinion, suggesting that Arraleh did not provide evidence that the County failed to respond to the harassment in a prompt and effective manner. As noted by the Eighth Circuit dissenting opinion, Arraleh presented evidence that he and two of his co-workers complained to managers Zurn and Brady about the discriminatory harassment directed toward him.[8] Zurn, the decision making manager, admitted that he did nothing in response.[9] The County never investigated Arraleh's allegations until after Arraleh brought suit.[10]

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[8] *Plaintiff's Memorandum Opposing Summary Judgment pp. 9-11, 14, 17-19, 26. Appellant's Brief pp. 7-9, 11, 14-16, 25.*

[9] *Plaintiff's Memorandum Opposing Summary Judgment pp 27. Appellant's Brief pp. 26, 38.*

[10] *Plaintiff's Memorandum Opposing Summary Judgment pp.17-19, 27. Appellant's Brief pp. 16, 26, 38*

CONCLUSION

The issues articulated for review in this case raise serious questions of law upon which the Circuit Courts of Appeal are not in accord, either with each other or with the precedent of this Court. The Court should grant the petition, reiterate the "severe or pervasive" standard of *Harris v. Forklift Sys. Inc.*, and answer the question of when the discriminatory conduct of non-decisionmakers is attributable to employers under Title VII and Section 1981.

Respectfully submitted,

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